Supreme Court, U.S.
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No. 94-1867

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AMERICAN LIFE LEAGUE INC., *et al.*,

Petitioners,

v.

JANET RENO,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEFS IN OPPOSITION

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I. Respondents Do Not Address The *Lopez* Majority: There Is No Substantial Interstate Commerce Affect to Justify FACE

Respondents contend that FACE, in Respondent Reno's words, "passes muster under two of the categories identified by the Court" in *United States v. Lopez*, 115 S. Ct. 1624 (1995). Respondent Reno Brief, at 9. Ergo, FACE is sustainable under *Lopez* as (1) a proper use of "Congress's power to regulate or protect 'persons or things in interstate commerce'" and (2) "as an exercise of Congress's power to regulate 'activities that substantially affect interstate commerce.' " *Ibid.* But the key quoted language is that of Respondent Reno, not that of *Lopez.*

Preliminarily, Petitioners note that, as to (1), *supra,* neither *Lopez* nor other Commerce Clause cases speak to "protect" or "protection" but to "regulate" or "regulation." The Commerce Clause is authority to regulate persons or things in interstate commerce, not to protect them.

Respondents attempt to fabricate a Commerce Clause *criminal* law stance that reflects the sweeping *regulatory* law dimension which the federal courts evolved during the 59 years preceding *Lopez* - that is, an almost irrebuttable presumption that if Congress felt a local activity implicated interstate commerce, federal jurisdiction would be sustained, with or without demonstrable substantiality. It mattered little whether the interstate commercial impact were slight or substantial. A plausible, if thin, interstate reed was adequate. *Wickard v.*

Filburn, 317 U.S. 111 (1942) (a trivial quantity of homegrown wheat integrally a part of a national crop regulatory system). *Lopez*, however, changed that, enquiring more discerningly not only about substantially of impact but also about the very existence of economic activity or commerce. Further, Repondents attempt to apply their expansive Commerce Clause reading not to regulatory, but to criminal, law. FACE, after all, regulates nothing; it criminalizes.

To engineer this legerdemain, Respondent Reno quotes not from the *Lopez* majority opinion but from one of two concurrences. "The Court [did not] reason . . ." as Respondent Reno contends, Respondent Reno Brief, at 11; two concurring Justices did. However, Justices Kennedy and O'Connor also signed the majority opinion. Consequently, their concurring comments are to be interpreted in the context of the majority opinion, not as the holding of the Court.

Respondent Reno's approach reveals the paucity of Respondents' arguments: Respondents find no support in the Opinion of the Court and must resort to out-of-context reliance upon a concurrence, ignoring the fact the concurring Justices also signed the Opinion of the Court.

FACE presents a case as clear as the *Lopez* statute in dealing with private conduct having no substantial affect upon interstate commerce. Congressional efforts to justify FACE in Tenth Amendment terms failed to make a substantial link between what it was designed to do and interstate commerce. As Chief Justice Rehnquist, addressing Justice Breyer's dissent, wrote in *Lopez*:

> Justice Breyer rejects our reading of precedent and argues that " Congress. . . could rationally conclude that schools fall on the commercial side of the line." *Post*, at 1664. Again, Justice Breyer's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial. Under the dissent's rationale, Congress could just as easily look at child rearing as "fall[ing] on the commercial side of the line" because it provides a "valuable service -- namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace." *Ibid.* We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

115 S. Ct. 1633.

Respondents argue against Petitioners in much the same way Justice Breyer argued against the majority in *Lopez*. But under this reasoning, as Chief Justice Rehnquist rightly points out, there is no limit to legislation in any area Congress wishes to enter, however local in nature. The Constitution makes the Federal Government one of limited powers (U.S. Const., Art. I, 4, §8), a restriction that virtually had disappeared

in regulatory law over the 59-year diversion. *Lopez* attempts to restrict the further emasculation of those constitutional limitations, particularly as to criminal law applicability. To accept Respondents' arguments would signal Congress and the federal courts that the intervening (and nullifying) approach to the Tenth Amendment, gone for a short time, was reinstated; and, more dramatically, that the expansive Commerce Clause sweep evolved over 59 years now, notwithstanding *Lopez,* was to be extended to criminal law.

Respondent Reno claims that FACE "may be sustained as an exercise of Congress's power to regulate 'activities that substantially affect interstate commerce.'" Opposition Brief, at 9. But nowhere does Respondent Reno demonstrate that this conclusion is based upon anything more than Congress's desire to render impossible peaceable (and nonpeaceable) prayer, protest and demonstration around abortion clinics. Absent is any real interstate commerce justification for intruding into what are essentially local matters where trespass and other local laws abound to preserve property rights and the peace and to prosecute violent crimes against abortion facilities and personnel.

Congress spoke of interstate commerce in committee hearings and cited alleged connecting links with violence around public health facilities, but nowhere did anything more than offer conclusional findings based upon inadequate showings of substantial interstate commerce impact. As Chief Justice Rehnquist also said in *Lopez*, that in reviewing legislation, as "a part of our independent evaluation of constitutionality under the Commerce Clause we of course

consider legislative findings, and indeed even congressional committee findings . . ." 115 S. Ct. at 1631. In short, this Court is not bound by such findings to establish substantial impact upon interstate commerce. Respondents, not content with inadequate and conclusional congressional findings, go further, enveloping every peaceful citizen who prays, sidewalk-counsels or demonstrates in some kind of alleged national conspiracy the totality of which substantially affects interstate commerce.[1]

II. Respondents Skirt any Definition of Nonviolent Physical Obstruction of Entrances to Clinics and Leave FACE in Definitional Limbo

Nowhere in their opposing briefs do Respondents try to deal with the vexing questions raised by FACE's prohibition of nonviolent physical obstruction of entrances to abortion clinics. Respondents do mention *United States v. Wilson,* 880 F. Supp. 621 (E.D. Wis. 1994), appeals pending, Nos. 95-1308, 95-1309, 95-1933, 95-1488 & 95-1494 (7th Cir.) Respondent

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[1] There may be scant limitation to the reach of *substantial affect* under Respondents' reasoning: Citizens who peacefully pray or demonstrate for or against nuclear power plants, military bases, pipelines, forests, open space, dams, affirmative action, homosexual activity, gun control and the like would be subject to federal jurisdiction as substantially affecting interstate commerce (and subsuming an economic activity). And if one blocked, even temporarily or accidentally, a proscribed entrance, and intended (economic, political, social or other) injury, the next FACE-type enactment would apply.

Reno Brief, at 12; Respondents National Abortion Federation, et al. Brief, at 6, 12. But they do not tell the Court that the District Court found one section of FACE to be constitutionally flawed -- namely, the provision in 18 U.S.C. § 248(a)(1) that prohibits as a crime something Congress termed in § (b), the penalties provision, "a non-violent physical obstruction" of entrances to reproductive health facilities with a fine of not more than $10,000 and imprisonment of not more than six months or both, for a first offense.

Respondents also fail to address *Cheffer v Reno,* 55 F.3d 1517, 1521 (11th Cir. 1995), which sustained the constitutionality of FACE but held FACE, 28 U.S.C. §248(a)(1), applicable only to *physical* "force or threat of force":

> The term "force" is often interpreted to mean "physical force." See *Johnson v. Mississippi,* 421 U.S. 213, 222-227, 95 S.Ct. 1591, 1597-1599, 44 L.Ed.2d 121 (1975) (interpreting similar language -- "by force or threat of force willfully injures, intimates, or interferes with" - to provide protection against violence). The context of [FACE] reinforces the "physical force" interpretation.

This increases the uncertainty as to FACE's applicability and dilutes its supposed substantial affect upon interstate commerce, for surely that substantial affect which Respondents perceive would be identical whether a criminal defendant ran afoul of the statute by nonphysical or physical force.

Nor do Respondents attempt to deal with the Tenth Amendment, not to mention the First Amendment questions inherent in criminalizing such conduct that does not involve physical violence. Of course, Congress did not define what it had in mind, thus making potentially criminal the peaceful picketing and praying of Petitioners and other like-minded individuals around abortion facilities, which naturally can cause nonviolent physical obstruction of clinic entrances (however temporary), although Petitioners and like-minded protesters are standing on public sidewalks or streets and do nothing that can be interpreted as threatening.

In *Wilson* the District Court analyzed Tenth Amendment considerations limiting the power of the Federal Government and concluded:

> Applying these principles to the case at bar, it is without question that non-violent physical obstruction is closely analogous to simple trespass, which historically and traditionally has rested within the domain state, and even local, authorities. Indeed, in such situations, Congress itself acknowledges that Tenth Amendment concerns are of prime importance in deciding whether or not to intervene in matters of state and local concern. 42 U. S. C. § 10501, discussed, *supra.* Therefore, the Tenth Amendment analysis clearly confirms the Court's earlier conclusion that Congress has exceeded the scope of its Commerce power.
>
> . . . This case represents a point at which the bedrock constitutional principle of enumerated

> powers is strained beyond meaning and recognition and a point at which the delicate balance and distinction between the powers of the Federal Government and the powers of the States is irretrievably lost.
>
> 880 F. Supp. at 634.

III. Strict Scrutiny Is the Proper Review Level

Respondent Reno asserts that *Madsen v Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), demonstrates Petitioners' error in contending FACE should be subject to strict scrutiny. Respondent Reno Brief, at 18, n. 7. But Petitioners correctly described *Madsen:* FACE is a statute, not an injunction; *Madsen* provides no guidance in evaluating whether FACE is not content- and viewpoint-neutral.

Intervening Respondents compound the error, mystifyingly accusing Petitioners of "vehement opposition" to *Madsen.* Yet Petitioners have expressed no opinion about the wisdom of *Madsen,* only arguing *Madsen* affords no basis for any scrutiny less than strict scrunity because it is inapplicable. The scrutiny level which FACE commands is of fundamental, and precedental, import, itself an adequate ground for Supreme Court review.

CONCLUSION

Petitioners raise serious constitutional questions involving the Commerce Clause, the First, Tenth and Fourteenth Amendments. For the foregoing reasons and those set out in the Petition, summarized in Part III, none of which Respondents convincingly address, this honorable Court should grant the Writ.

Respectfully submitted.

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